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IN THE

Supreme Court of the United States

GLORIA GAIL KURNS, EXECUTRIX OF THE ESTATE OF GEORGE M. CORSON, DECEASED, AND FREIDA E. JUNG CORSON, WIDOW IN HER OWN RIGHT

Petitioners,

v.

RAILROAD FRICTION PRODUCTS CORPORATION AND VIAD CORPORATION

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

DID CONGRESS INTEND THE FEDERAL RAILROAD SAFETY ACTS TO PREEMPT STATE LAW-BASED TORT LAWSUITS?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Gloria Gail Kurns and Freida E. Jung Corson are individuals and plaintiffs-petitioners in this action. Ms. Kurns is the executrix of the estate of the late George M. Corson. Mrs. Corson is the widow of George M. Corson.

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OPINIONS BELOW

Defendants-Respondents Railroad Friction Products, ("RFPC") and VIAD Corporation ("VIAD"), moved for summary judgment in the Court of Common Pleas of Philadelphia County, First Judicial District of Pennsylvania. RFPC and VIAD argued that there was insufficient evidence of Petitioners' Decedent, George M. Corson's exposure to asbestos from any of Respondents' products to find factual causation. *Kurns v. Airco Welders Supply, Inc.*, 2008 Phila. Ct. Com. Pl. LEXIS 241 (2008). VIAD argued that Petitioners' claims were barred by the doctrine of federal preemption. The Philadelphia Court of Common Pleas denied RFPC's and VIAD's motions for summary judgment, but granted the summary judgment motions filed by several other defendants.

On May 13, 2008, following the grants of summary judgment to some defendants and the voluntary dismissal of other defendants, including the first captioned defendant, A.W. Chesterton, Inc., RFPC removed the remainder of the case to the United States District Court for the Eastern District of Pennsylvania. Petitioners asked the District Court to reconsider the state court grants of summary judgment to Defendants Soo Line Railroad, Airco/BOC and Westinghouse Air Brake.[1] District Court Judge James T. Giles denied these

1. A.W. Chesterton was voluntarily dismissed by Petitioners in the state court action on April 25, 2008, prior to removal to the District Court. The only remaining defendants in the state court case before its removal were RFPC and VIAD. *Kurns v. Airco Welders Supply, Inc.*, 2008 Phila. Ct. Com. Pl. LEXIS 241 (2008) at *2-3.

(Cont'd)

motions, stating that he lacked jurisdiction over the defendants who had won summary judgment in the state court. (App. C at 40a).

RFPC and VIAD again moved for summary judgment in the District Court[2] claiming that federal law preempted Petitioners' claims. On February 5, 2009, District Court Judge Mitchell S. Goldberg granted these defendants summary judgment. *Kurns v. A. W. Chesterton, Inc.*, 2009 U.S. Dist. LEXIS 7757 (E.D. Pa. Feb. 3, 2009) (App. B at 22a). Petitioners appealed to the United States Court of Appeals for the Third Circuit on March 4, 2009. After briefing and oral argument, the Third Circuit panel affirmed the District Court's orders in an opinion filed on September 9, 2010. *Kurns v. A. W. Chesterton, Inc.*, 2010 U.S. App. LEXIS 18853 (3d Cir.

(Cont'd)

Linde, LLC f/k/a/The BOC Group f/k/a/ Airco Welders Supply, Inc., ("BOC/Airco") was granted summary judgment by the Philadelphia Court of Common Pleas on May 13, 2008. *See Kurns v. Airco Welders Supply, Inc., Id.* The United States District Court for the Eastern District of Pennsylvania denied Petitioners' motion to reconsider the state court grant of summary judgment to Linde/BOC/Airco, stating that it had no jurisdiction over a defendant that was dismissed in the state court action. (*See* Appendix C at 40a).

2. As noted earlier, only VIAD raised the issue of federal preemption in the state court. However, Pa.R.C.P. P. 1041 provides that when one defendant raises an issue that would defeat the claims as to all defendants, it is deemed filed on behalf of all defendants. The state court rejected VIAD's preemption argument based *upon Norfolk & W.R. Co. v. Pa. Pub. Util. Comm'n.*, 413 A.2d 1037 (Pa. 1980). RFPC raised the preemption issue before the District Court in the case herein.

2010). (App. A at 1a). On September 22, 2010, Petitioners moved for a rehearing *en banc*, which was denied on October 5, 2010. (App. D at 42a).

In addition to the opinions in the instant case, Petitioners' counsel have previously responded to two petitions for writs of certiorari in two Pennsylvania state cases in which the Pennsylvania Superior Court affirmed judgments. In both of those cases, the Pennsylvania Supreme Court rejected petitions for appeal. The sole issue on appeal in those cases is federal preemption. In the first of those cases, the Pennsylvania Superior Court published its opinion affirming judgment. *Atwell v. John Crane, Inc.*, 986 A.2d 888 (Pa.Super. 2010). The Petition for Writ of Certiorari is pending in this Court at No. 10-272.[3] In the second case, *Harris v. Griffin Wheel, Inc.*, the Pennsylvania Superior Court did not publish an opinion. The Petition for Writ of Certiorari is pending in this Court at No 10-520 in *Harris*.[4]

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3. At the conference regarding the Petition for Writ of Certiorari filed by Petitioner John Crane in *Atwell*, this Court asked for the Solicitor General to submit a brief regarding the U.S. Government's views.

4. Although undersigned counsel recognize the importance of the issues raised in the two Pennsylvania cases noted above, counsel's paramount duty to those clients in securing the judgments precludes counsel from acquiescing to the petitions for writs of certiorari there, especially where the issue is better presented in the instant case.

STATEMENT OF JURISDICTION

Petitioners seek review of the opinion of the Third Circuit Court of Appeals filed on September 9, 2010. *Kurns v. A. W. Chesterton, Inc.*, 2010 U.S. App. LEXIS 18853 (3d Cir. 2010). (App. A at 1a). Thereafter, Petitioners timely filed a Petition for Rehearing En Banc with the Third Circuit. The Third Circuit denied a rehearing on October 5, 2010. (App. D at 42a). This Court has jurisdiction under 28 U.S.C. § 1254 (2006).

STATUTES INVOLVED

This Petition presents a question of implied field preemption arising from Congress' enactment of the original Boiler Inspection Act, (hereinafter "BIA"), currently codified at 49 U.S.C. §§ 20701-20703 (2007) as the Federal Railroad Safety Act ("FRSA"), and the Safety Appliance Act, (hereinafter "SAA"), 49 U.S.C. §§ 20301 *et seq.*,

The relevant provisions of the BIA are as follows:

49 U.S.C. § 20701 – "Requirements for Use":

> A railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances –
>
> > (1) are in proper condition and safe to operate without unnecessary danger of personal injury;

> (2) have been inspected as required under this chapter and regulations prescribed by the Secretary of Transportation under this chapter; and
>
> (3) can withstand every test prescribed by the Secretary under this chapter.

The relevant portions of the FRSA, 49 U.S.C. § 20106 are as follows:

> (a) **National Uniformity of Regulation**
>
> (1) Laws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable.
>
> (2) A state may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security when the law, regulation, or order-
>
> (A) is necessary to eliminate or reduce an essentially local safety or security hazard;

(B) is not incompatible with a law, regulation, or order of the United States Government; and

(C) does not unreasonably burden interstate commerce.

(b) **Clarification Regarding State Law Causes of Action.**

(1) Nothing in this section shall be construed to pre-empt an action under State law seeking damages for personal injury, death, or property damage alleging that a party-

(A) has failed to comply with the Federal standard of care established by a regulation order issued by the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), covering the subject matter as provided in subsection (a) of this section;

(B) had failed to comply with its own plan, rule, or standard that it created pursuant to a regulation or order issued by either of the Secretaries; or

(C) has failed to comply with a State law, regulation, or order that is not incompatible with subsection (a)(2).

(2) This subsection shall apply to all pending State law causes of action arising from events or activities occurring on or after January 18, 2002.

(c) **Jurisdiction.** Nothing in this section creates a Federal cause of action on behalf of an injured party or confers Federal question jurisdiction for such State law causes of action.

The relevant portions of the SAA are:

49 U.S. C. § 20302 - "General Requirements":

(a) General. **Except as provided in subsection (c) of this section and section 20303 of this title [49 USCS § 20303], a railroad carrier may use or allow to be used on any of its railroad lines—**

(1) a vehicle only if it is equipped with—

(A) couplers coupling automatically by impact, and capable of being uncoupled, without the necessity of individuals going between the ends of the vehicles;

(B) secure sill steps and efficient hand brakes; and

(C) secure ladders and running boards when required by the Secretary of Transportation, and, if ladders are required, secure handholds or grab irons on its roof at the top of each ladder;

(2) except as otherwise ordered by the Secretary, a vehicle only if it is equipped with secure grab irons or handholds on its ends and sides for greater security to individuals in coupling and uncoupling vehicles;

(3) a vehicle only if it complies with the standard height of drawbars required by regulations prescribed by the Secretary;

(4) a locomotive only if it is equipped with a power-driving wheel brake and appliances for operating the train-brake system; and

(5) a train only if—

(A) enough of the vehicles in the train are equipped with power or train brakes so that the engineer on the locomotive hauling the train can control the train's speed without the necessity of brake operators using the common hand brakes for that purpose; and

(B) at least 50 percent of the vehicles in the train are equipped with power

or train brakes and the engineer is using the power or train brakes on those vehicles and on all other vehicles equipped with them that are associated with those vehicles in the train.

(b) Refusal to Receive Vehicles Not Properly Equipped. **A railroad carrier complying with subsection (a)(5)(A) of this section may refuse to receive from a railroad line of a connecting railroad carrier or a shipper a vehicle that is not equipped with power or train brakes that will work and readily interchange with the power or train brakes in use on the vehicles of the complying railroad carrier.**

(c) Combined Vehicles Loading and Hauling Long Commodities. **Notwithstanding subsection (a)(1)(B) of this section, when vehicles are combined to load and haul long commodities, only one of the vehicles must have hand brakes during the loading and hauling.**

(d) Authority to Change Requirements. **The Secretary may—**

(1) change the number, dimensions, locations, and manner of application prescribed by the Secretary for safety appliances required by subsection (a)(1)(B) and (C) and (2) of this section only for good

cause and after providing an opportunity for a full hearing;

(2) amend regulations for installing, inspecting, maintaining, and repairing power and train brakes only for the purpose of achieving safety; and

(3) increase, after an opportunity for a full hearing, the minimum percentage of vehicles in a train that are required by subsection (a)(5)(B) of this section to be equipped and used with power or train brakes.

(e) Services of Association of American Railroads. **In carrying out subsection (d)(2) and (3) of this section, the Secretary may use the services of the Association of American Railroads.**

STATEMENT OF THE CASE

A. Form of Action and Procedural History

On June 13, 2007, George Corson ("Mr. Corson") and his wife, Freida E. Jung Corson ("Mrs. Corson"), filed a complaint in the Philadelphia County Court of Common Pleas because Mr. Corson contracted malignant mesothelioma, the only generally-accepted cause of which is asbestos exposure.[5] Mr. Corson died from this disease on November 17, 2007. His daughter, Gloria Gail Kurns ("Mrs. Kurns"), was thereafter appointed Executrix of his Estate and was substituted as a party-plaintiff. Mrs. Kurns and her mother, Mrs. Corson, are Petitioners herein.

Defendants including respondents RFPC and VIAD moved for summary judgment in state court. Generally, the defendants argued that there was insufficient evidence of Mr. Corson's exposure to asbestos from their respective products to merit trial. *See Kurns v. Airco Welders Supply, Inc.*, 2008 Phila. Ct. Com. Pl. LEXIS 241 (2008). The state court denied RFPC's and VIAD's motions for summary judgment, but granted the summary judgment motions filed by the other defendants, including Soo Lines Railroad, the successor to Milwaukee Road.

On May 13, 2008, following the grants of summary judgment to some defendants and the voluntary

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5. Respondents did not contest the mesothelioma diagnosis nor did they contest that Mr. Corson's mesothelioma was caused by asbestos exposure.

dismissal of other defendants, including the first captioned defendant, A.W. Chesterton, Inc., RFPC removed the case to the United States District Court for the Eastern District of Pennsylvania. After the case was removed, Petitioners asked the District Court to reconsider the state court grants of summary judgment to Defendants Soo Line Railroad, Airco/BOC and Westinghouse Air Brake.[6] Chief District Court Judge James T. Giles denied Petitioners' reconsideration motions on the grounds that the district court lacked jurisdiction over the defendants who had won summary judgment in the state court. (App. C at 40a).

RFPC and VIAD moved for summary judgment in the District Court. This time, both defendants claimed that federal law preempted Petitioners' claims. On February 5, 2009, District Court Judge Mitchell S. Goldberg granted RFPC's and VIAD's summary judgment motions. (App. B at 22a).

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6. Airco Welders Supply, Inc./The BOC Group ("Airco/BOC"), now doing business as part of Linde, LLC, was a party to the Superior Court appeal. *See Kurns v. Airco Welders Supply, Inc.*, 2008 Phila. Ct. Com. Pl. LEXIS 241 (2008). The Pennsylvania Superior Court dismissed the appeal as interlocutory due to the existence of the removed claims in federal court that are the subject of this appeal. *Kurns v. Airco Welders Supply, Inc.*, 986 A.2d 1293 (Pa. Super. 2009).

A.W. Chesterton was voluntarily dismissed by Appellants in the state court action on April 25, 2008, prior to removal to the District Court. The only remaining non-dismissed defendants in the state court action prior to removal were RFPC and VIAD. *Kurns v. Airco Welders Supply, Inc.*, 2008 Phila. Ct. Com. Pl. LEXIS 241 (2008) at *2-3.

Petitioners appealed to the United States Court of Appeals for the Third Circuit on March 4, 2009. The Third Circuit affirmed the District Courts orders on September 9, 2010. (App. A at 1a). On September 22, 2010, Petitioners moved for a rehearing en banc, which the Third Circuit denied on October 5, 2010. (App. D at 42a). This petition for Writ of Certiorari followed.

B. Facts Necessary to the Disposition of the Case

From 1949-1974, Mr. Corson was exposed to asbestos from his work on the Chicago, Milwaukee, St. Paul & Pacific Railroad (the "Milwaukee Road"). He worked on locomotives manufactured by the Baldwin Locomotive Company, predecessor-in-interest to Respondent VIAD Corporation ("VIAD"). These locomotives were insulated with asbestos. The locomotives also had asbestos-containing brake shoes distributed by Respondent Railroad Friction Products Corporation ("RFPC"), which Mr. Corson had to change on a regular basis.

Mr. Corson testified during his deposition that he first worked for the Milwaukee Road in Mobridge, SD in 1949. He moved to Montana, and continued to work for the Milwaukee Road there. As a machinist's helper, he worked on Baldwin steam-powered locomotives.[7] Pipefitters, boilermakers, tinsmiths and painters worked near him. The pipefitters removed old insulation from the boilers and installed new insulation. The pipefitters also used asbestos cement and tape.

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7. Mr. Corson knew that the locomotives were manufactured by Baldwin because the name was on the front of the engine, below the boiler.

Sometimes old insulation was ground up into a powder, mixed with water, and re-used as a paste. Mr. Corson handled what he called "rigid asbestos." This came in sheets and insulated the boiler. His work on boiler valves required him to handle the insulation around the boiler. Once a year, the machinists would remove all the asbestos from the boiler so they could test the strength of the metal by tapping all around the boiler with a hammer. The pipefitters replaced all the insulation except that around the valves, which the machinists replaced.

In the 1960s and into the early 1970s, Mr. Corson's son, Terry Corson ("Terry"), worked with him at Lewistown, MT. Terry testified that the Milwaukee Road had different varieties of brake shoes in stock at Lewistown, including grinding shoes, freight car shoes and locomotive shoes. There was usually a pallet of freight car shoes and a pallet of locomotive shoes on hand, and each pallet held hundreds of shoes. Terry estimated that he and his father changed about a dozen brake shoes a week. They used COBRA composition brake shoes[8] on both boxcars and locomotives. Terry did not recall using any other brand. Terry testified that his father was a "working foreman" who did brake changes himself. Mr. Corson worked on the Milwaukee Road until 1974.

Mr. Corson was diagnosed with asbestos-caused malignant mesothelioma in 2007, and he died from this disease.

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8. As stated in Petitioners' original Complaint and conceded in RFPC's motion, RFPC distributed COBRA asbestos-containing railroad brake shoes.

REASONS FOR GRANTING THE PETITION

CONGRESS DID NOT INTEND THE FEDERAL RAILROAD SAFETY ACTS[9] TO PREEMPT STATE LAW-BASED TORT LAWSUITS.

A. This Court has consistently allowed railroad workers and non-railroad workers alike to sue the entities subject to the railroad safety acts under state law.

In its decision in this case, the Third Circuit held that federal legislation preempted the field of railroad safety regulation so as to preclude state tort lawsuits against companies that supplied asbestos-containing equipment to the railroads. In so ruling, the Third Circuit relied upon this Court's decision in *Napier v. Atlantic C. Ry. Co.*, 272 U.S. 605 (1926). For the reasons that follow, this Court's review is necessary to correct the Third Circuit's and other lower courts' gross misinterpretations of this Court's decisions with respect to railroad safety regulations.

In *Napier*, this Court held that federal safety legislation and regulations occupied the field of "legislation." *Napier* struck down state laws that required particular kinds of locomotive equipment, such as firebox doors or cab curtains, on locomotives traveling through a particular state. 272 U.S. at 609-610. Since

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9. This Court has repeatedly held that the FRSA, BIA, SAA and FELA are to be read as one. *Urie v. Thompson*, 337 U.S. 163 (1949). In this Petition for Certiorari, Petitioners sometimes refer to these acts as a group as "railroad safety acts."

locomotive components were potentially within the federal government's scope of authority, the states could not legislate even in the absence of federal government action: "We hold that state ***legislation*** is precluded, because the Boiler Inspection Act, as we construe it, was intended to occupy the field." *Id.* at 612. (emphasis added). The field was thus defined as "legislation."

For the first 70 years following *Napier*, this Court and other courts of last resort at the state level interpreted *Napier* as establishing the primacy of federal establishment of railroad safety standards. However, in giving precedence to the federal standards, this Court and other courts allowed injured parties to remediate violations of those standards through state tort law remedies.

Typical of the cases decided after *Napier* is *Tipton v. Atchison, T. & S. F. R. Co.*, 298 U.S. 141 (1936). In *Tipton*, a California railroad switchman, not engaged in interstate commerce, was injured as a result of a defective coupling mechanism. *Id.* at 145. This Court found that injury resulted from a violation of the federal standards. *Id.* at 146. In construing the Safety Appliance Act ("SAA"), this Court held:

> The Safety Appliance Acts impose an absolute duty upon an employer and prescribe penal sanctions for breach. The earliest, that of 1893, affected only cars which were being used in interstate commerce. By the Act of 1903 the duty was extended to all cars used upon any railroad which is a highway of interstate commerce. The absolute duty imposed

> necessarily supersedes the common law duty of the employer. But, unlike the Federal Employers' Liability Act, which gives a right of action for negligence, the Safety Appliance Acts leave the nature and the incidents of the remedy to the law of the states. The Safety Appliance Acts modify the enforcement, by civil action, of the employe's common law right in only one aspect, namely, by withdrawing the defense of assumption of risk. They do not touch the common or statute law of a state governing venue, limitations, contributory negligence, or recovery for death by wrongful act.
>
> *Id.* at 146

Thus, Tipton was left to state remedies, which in this case, were limited to workers compensation. *See also, Gilvary v. Cuyahoga V. R. Co.*, 292 U.S. 57 (1934).

In *Fairport, P. & E.R. Co. v. Meredith*, 292 U.S. 589 (1934), this Court upheld a personal injury verdict based upon a finding that the defendant railroad had violated the SAA's requirements as to brakes. Defendant's train hit plaintiff's automobile at a grade crossing. Plaintiff was not a railroad employee, and her claim was not governed by FELA. This Court ruled that she could sue for a violation of the SAA and that her right to bring her suit "derived from principles of common law." *Id.* at 598. The Supreme Court held that issues other than the railroad's duty to comply with the specific requirements of the SAA were governed by state law. *Id.* Had *Napier* been read as broadly as defendants

suggest, the *Meredith* lawsuit would have been preempted.

In *Atchison, T. & S.F. R. Co. v. Scarlett*, 300 U.S. 471 (1937), a railroad worker was injured when descending a ladder from a box car. The ladder itself was a required safety appliance. The worker's foot slipped on a slanting brace rod, which was immediately behind the ladder. The ladder itself conformed to the federal regulations promulgated under the SAA, and as a result, this Court held that there was no violation of the SAA. *Id.* at 472. This Court nevertheless found that the worker had a common law remedy sounding in negligence for the proximity of the slanting brace rod to the ladder:

> The right of recovery, if any, must therefore rest upon the effect of the near proximity of the ladder to the rod, neither being in itself defective. The law to be applied to that situation is the common-law rule of negligence, and not the inflexible rule of the Safety Appliance Act; and the questions to be answered are whether the two appliances were maintained in such relation to one another as to constitute negligence on the part of the company and, if so, whether Scarlett assumed the risk.
>
> *Id.* at 475

Contrary to Respondents' reading of the law following *Napier*, this Court allowed the lawsuit. The worker was prevented from arguing to the jury that there was strict

liability because the ladder complied with the Safety Appliance Act. *Id.* at 474. Given that this Court cited *Napier* in this decision, and that this Court remanded the case for a trial on the negligence claim, this Court clearly did not construe the railroad safety acts as precluding such lawsuits.

In *Breisch v. Central R. of N. J.*, 312 U.S. 484 (1941), this Court recognized the principle decided in *Tipton*: "It is clear that an employee injured in intrastate transportation by defective equipment of an interstate railroad comes under the Safety Appliance Acts. Nor is there any longer a question as to the power of the state to provide whatsoever remedy it may choose for breaches of the Safety Appliance Acts. The federal statutes create the right; the remedy is within the state's discretion. (Footnotes and citations omitted)." *Id.* at 486. In *Breisch*, this Court recognized that a railroad employee not engaged in interstate commerce could afford himself of a state court common law remedy against the railroad, despite the existence of the Workers Compensation Act.

Despite *dicta* in *Napier* that could have been interpreted so as to preclude all state regulation of railroad safety, many states enacted legislation or regulations that affected the railroads. For example, Iowa directed that all railroad operate cabooses with two platforms. The railroad complained that Iowa had no right to enforce such a regulation. In *Fleming v. Richardson*, 24 N.W. 2d 280 (Ia. 1946), the Iowa Supreme Court upheld the regulation against a preemption argument. In a later case, the Iowa Supreme Court explained its rationale:

> An exercise by a state of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so direct and positive the two acts cannot be reconciled or consistently stand together. *Fleming v. Richardson*, 237 Iowa 808, 830, 831, 24 N.W.2d 280; *Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 65 S.Ct. 1515, 89 L.Ed. 1915; *Terminal R. Assn. v. Brotherhood of Railroad Trainmen*, 318 U.S. 1, 63 S.Ct. 420, 87 L.Ed. 571; 15 Am. Jur.2d, Commerce, section 69, page 714; and 15 C. J. S., Commerce, section 11, page 266.
>
> *Powers v. McCullough*, 140 N.W. 2d 378, 382 (Ia. 1966)

Because the SAA said nothing about the number of platforms on cabooses, Iowa was free to regulate.

In *Shields v. Atlantic C. L. R. Co.*, 350 U.S. 318 (1955), this Court held that an independent contractor had a right of action against the railroad under state law in strict liability for violating the Safety Appliance Act. There was no suggestion whatsoever that the Safety Appliance Act precluded a lawsuit against the railroad. This Court found that the independent contractor was owed a duty:

> There is no merit in respondent's contention that, since petitioner is not one of its employees, no duty is owed him under § 2 of the Act. Having been upon the dome running

> board for the purpose of unloading the car, he was a member of one class for whose benefit that device is a safety appliance under the statute. As to him, the violation of the statute must therefore result in absolute liability. *Coray v. Southern Pacific Co.*, 335 U.S. 520; *Brady v. Terminal Railroad Assn.*, 303 U.S. 10; *Fairport, P. & E.R. Co. v. Meredith*, 292 U.S. 589; *Louisville & N.R. Co. v. Layton*, 243 U.S. 617.
>
> *Id.* at 325

Not a single member of the Court, either in the majority or the dissent, suggested that plaintiff did not have a remedy under state tort law for the alleged Safety Act violation.

Another typical case is *Boyer v. Atchison T. & S. F. R. Co.*, 38 Ill. 2d 31 (1967), *cert. denied*, 390 U.S. 949 (1968). There the railroad passenger, traveling on a free pass issued by the railroad, sued to recover for violation of the SAA because he was thrown to the floor when a defective coupler broke. The passenger was allowed to press a claim in state court under strict liability. Again, the passenger's right to assert the state court action was unquestioned.

By the time that the Pennsylvania Supreme Court decided *Norfolk & W. R. Co. v. Pa. Public Util. Com.*, 489 Pa. 109 (1980), the parameters of *Napier*, *Tipton* and *Shields* were generally understood to restrict states from legislating or regulating in conflict with the Interstate Commerce Commission ("ICC") or Federal Railroad Administration ("FRA"). The Pennsylvania

Supreme Court also took guidance from the 1970 legislative history of the FRSA:

> Appellees urge that *Napier* and *Bessemer* are controlling on the issue of preemption by the Boiler Inspection Act. We disagree. While the broad language of the Act at one time could have been interpreted as reflecting Congressional intent to preempt the entire field of railroad safety, the enactment of section 205 of the Federal Railroad Safety Act in 1970 no longer permits that reading. Section 205 provides:
>
> > A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary [of Transportation] has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce. [footnote omitted].
>
> *Id.* at 120-121.

It is noteworthy that the Pennsylvania Supreme Court's interpretation of the FRSA and the harmonization of *Napier* with some of the cases cited above continued for sixteen (16) years without change.

Manufacturers and suppliers of railroad products became regulated entities under the FRSA, along with the railroads in 1992. 45 U.S.C. § 34. The stampede to deprive railroad workers injured by defective products from pressing claims against those manufacturers and suppliers began in earnest thereafter. Ignoring the more than 70 years of precedent noted above, the 9th Circuit ruled that *Napier* prevented railroad workers alleging hearing losses from pressing state law tort claims against the manufacturers and suppliers of devices that caused the hearing losses. *Law v. GMC*, 114 F.3d 908 (9th Cir. 1997). Relying upon *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149 (9th Cir. 1983), the court in *Law* held that the Boiler Inspection Act preempted the products liability case against the locomotive manufacturers. Since *Marshall* is the underpinning of *Law*, it is important to analyze.

In *Marshall*, the widow of a motorist killed at a grade crossing by a Burlington Northern train sued the railroad. The theory of recovery was that the train should have been equipped with oscillating lights and/or strobe lights. The *Marshall* court did give the FRSA broad preemptive effect. 720 F.2d at 1153. However, the *Marshall* court also pointed out that the FRA had considered requiring trains to be equipped with the equipment that the plaintiff argued was necessary to prevent the accident in question, but that the agency had rejected that requirement. 720 F.2d. at 1153-1154.

Thus, the theory of recovery was in direct conflict with the federal regulatory requirement because it took on the character that the federal agency should have mandated a particular requirement that it rejected.

Law expanded the *Marshall* view of preemption by reading *Napier* literally and broadly without any of the limitations imposed by such decisions as *Tipton* or *Shields*, supra. The *Law* court failed to mention that in 1992, Congress amended the safety acts to subject manufacturers and suppliers of railroad equipment to federal regulation and potential fines for non-compliance. 45 U.S.C. § 34 (Pub. Law 102-365, § 9(a)(8)). The railroads had been subject to safety acts since 1893 and understood that they were subject to state tort lawsuits for violations of federal safety standards. However, the manufacturers of railroad products ignored the decades of court decisions that allowed state tort lawsuits against the regulated entity, viz. the railroads. The manufacturers took a more aggressive stance: since they were subject to federal regulation, they reasoned, there could only be a federal remedy for violations of those regulations, and state remedies were preempted. The *Law* court accepted this argument in order to effectuate "national uniformity of regulations." 114 F.3d at 110-111.

The *Law* court noted that injured railroad workers could make a claim under FELA for their injuries, and that "[p]roof of a BIA violation is enough to establish negligence as a matter of law and neither contributory negligence nor assumption of risk can be raised as a defense." Railroad workers who are injured by trains which are "in use" can make a strict liability claim under

the BIA or SAA. However, railroad workers who are injured as a result of working on trains in the repair shops, such as Mr. Corson in this case, cannot make strict liability claims under the BIA or SAA.

This Court has rarely ruled upon what constitutes "in use." *See*, *Brady v. Terminal R Ass'n*, 303 U.S. 10, 13 (1938). On those rare occasions when the issue has arisen, the lower appellate courts have uniformly held that the BIA and SAA "exclude those injuries directly resulting from the inspection, repair, or servicing of railroad equipment located at a maintenance facility." *Steel v. Burlington Northern, Inc.*, 720 F.2d 975 (8th Cir. 1983); *Angell v. Chesapeake & O.R Co.*, 618 F.2d 260, 262 (4th Cir. 1980); *Tisneros v. Chicago & N.W. Ry. Co.*, 197 F.2d 466 (7th Cir. 1952), *cert. denied*, 344 US 885 (1952). Put somewhat differently, neither the BIA nor the SAA applied to Mr. Corson since he was injured as a result of exposure to asbestos that occurred in the railroad repair shops. It stands to reason that if the statute does not give Petitioners a claim, it cannot preclude Petitioners from other remedies.

Without question, *Law* began the "reign of error." However, just because a number of lower courts have followed *Law* does not make it correct. As noted above, this Court has never endorsed the broad reading of implied federal field preemption that the literal language of *Napier* suggested. Rather, this Court in later decisions interpreted *Napier* as applying to the field of federal legislation (and regulation), and where there were conflicts, this Court upheld the supremacy of federal law. By granting certiorari in this case, this Court can reestablish the harmony in this Court's

decisions interpreting *Napier*, harmony that existed before the decision in *Law* and the misguided decisions following *Law*.

B. Neither the Safety Appliance Act nor the Boiler Inspection Act contained preemptive language, and subsequent reenactments have evidenced congressional intent not to preempt state regulation.

The legislative history of the railroad safety acts documents congressional intent to allow state tort lawsuits. Beginning in 1893 with the adoption of the first Safety Appliance Act, the railroads were subject to state court lawsuits. This Court held that Congress had the power to require safety devices on every railroad engaged in interstate commerce, even if the particular cars were only engaged in intrastate commerce. *Southern R. Co. v. United States*, 222 U.S. 20 (1911). The primary purpose of the railroad safety acts was to protect trainmen and the riding public. *Urie v. Thompson*, 337 U.S. 163 (1949).

The original SAA and BIA contained no statement of congressional intent to preempt state regulation or state tort lawsuits. In 1970, though, in enacting the FRSA, Congress declared that it did not want to preempt state regulations, and therefore, state-based remedies. *See* H.R. REP. 91-1194 (1970), reprinted in 1970 U.S.C.C.A.N. 4104, 1970 WL 5692 (Leg. Hist.).

> At the present time where the federal government has authority, with respect to rail safety, it preempts the field. With respect to

> the reported bill, the task force recommended that existing state requirements remain in effect **until** preempted by federal action.
>
> H.R. REP. 91-1194, at 4108 (emphasis added).

Prior to 1970, the FRA had allowed the states to regulate unless and until the FRA chose to regulate in the same area. The purpose of the 1970 amendments was to confer congressional approval on this practice. The legislative history of the FRSA demonstrates that Congress believed that its goal of protecting railroad workers' safety could best be accomplished by recognizing state authority over some rail safety matters. The FRSA authorized state regulation in "any area of rail safety" until preempted by an action of the Secretary (i.e. a regulation or order, not a statute) "with respect to the **particular** matter." It did so for the stated purpose of "promot[ing] safety in all areas of railroad operations":

> Summary of the Reported Bill
>
> **The Purpose of this bill is to promote safety in all areas of railroad operations,** to reduce railroad related accidents, and to reduce deaths and injuries to persons and damage to property caused by accidents involving any carrier of hazardous materials.
>
> To provide the legislative framework to achieve this purpose, the reported bill includes,
>
> * * *

4. State Regulation

> Section 205 **authorizes states to regulate** in **any area of railroad safety** until the Secretary acts with respect to the **particular** subject matter.
>
> *Id.*, at 4112 (emphasis added).

The final recommendations in the legislative history contain the same federal and state relationship, namely that the power to regulate matters of rail safety be continued in the states, and even expanded, unless and until a federal regulation specifically preempted the state regulation:

> The specific recommendations of this task force are:
>
> * * *
>
> 3. Existing state rail safety statutes and regulations remain in force until and unless **preempted by federal regulation.** Administration of the program should be through a federal-state partnership, including state certification similar to the certification principles set forth in the federal natural gas pipeline safety act of 1968.
>
> *Id.*, at 4129.

Congress decided to retain the provisions of the BIA and SAA intact, but at the same time precluded any

preemptive effect previously attributed to them, except when federal law or regulations conflicted with state law or regulations. That is the meaning of the legislative history. While the legislative history documents that the BIA and SAA would "continue without change," the same paragraph of the legislative history also documents that the BIA and SAA would continue to be supplemented by state law. Had Congress intended that the BIA and SAA preempt state law, Congress would not have set forth the following language:

> These particular laws have served well. In fact the committee chose to continue them without change. It is recognized, however, that they meet only certain and special types of railroad safety hazards. ... Consequently, there is a strong consensus which makes it appear clearly that the time is now here for broadscale federal legislation with **provisions for state participation to assure a much higher degree of railroad safety in the years ahead.**
>
> *Id.* at 4105 (emphasis added)

As can be seen above, in its 1970 reenactment of the BIA and SAA, Congress adopted a specific lack of preemption clause, now codified at 49 U.S.C. § 20106(a). The lack of preemption clause broadly applies to "railroad safety matters."

In cases decided after the passage of this reenactment, this Court has validated congressional intent in specifying the degree to which federal

legislation should have or not have a preemptive effect. Where a statute contains an express preemption clause, as the FRSA does here, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent. *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993). Under *Easterwood*, the clause cited above in the 1970 reenactment should be given such effect. Congress did not intend to preempt state law tort claims.

Congress not only recognized state regulatory authority in the preemption clause cited above, but also expressly recognized that the states' authority over rail safety extends to "railroad equipment" and "rolling stock." Congress provided that a "State may participate in [investigations and surveillance] activities when the safety practices for **railroad equipment**, facilities, **rolling stock**, and operations in the State are **regulated by a State authority**..." 49 U.S.C. § 20105 (emphasis added).[10] Had Congress wished to occupy the field, Congress would not have included this express recognition of already-existing state authority, which the 1970 amendments expanded.

In 2007, Congress amended the FRSA, adding Section (b) to the prior enactment.[11] The statute now reads:

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10. Rolling stock refers to rail cars and locomotives, which are also the subject of the BIA and SAA. 49 C.F.R. § 224.5.

11. Section (a) has been the law since 1970, except for a homeland security reference.

(a) National uniformity of regulation

(1) Laws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable.

(2) A state may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security when the law, regulation, or order-

(A) is necessary to eliminate or reduce an essentially local safety or security hazard;

(B) is not incompatible with a law, regulation, or order of the United States Government; and

(C) does not unreasonably burden interstate commerce.

(b) Clarification regarding State law causes of action.

(1) Nothing in this section shall be construed to pre-empt an action under State law seeking damages for personal injury, death, or property damage alleging that a party-

(A) has failed to comply with the Federal standard of care established by a regulation order issued by the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), covering the subject matter as provided in subsection (a) of this section;

(B) had failed to comply with its own plan, rule, or standard that it created pursuant to a regulation or order issued by either of the Secretaries; or

(C) has failed to comply with a State law, regulation, or order that is not incompatible with subsection (a)(2).

(2) This subsection shall apply to all pending State law causes of action arising from events or activities occurring on or after January 18, 2002.

(c) Jurisdiction. Nothing in this section creates a Federal cause of action on behalf of an injured party or confers Federal question jurisdiction for such State law causes of action.

49 U.S.C. § 20106 (b) (2007).

Under this revised statute, Congress showed its continued intent to reject the expansive and outdated preemptive effect that this Court gave the BIA and SAA in *Napier*. Since the Third Circuit mistakenly based its opinion on that reading, this Court should entertain review.

This Court has stated that it regards § 20106(a)(2) as "a provision that displays considerable solicitude for state law in that its express pre-emption clause is both prefaced and succeeded by express saving clauses." *Easterwood*, 507 U.S. at 665 (citation omitted).

The Secretary of Transportation through the FRA has never issued a regulation or an order "covering the subject matter" of asbestos in railroad equipment, the asbestos content of brake shoes, or warning of the risk of asbestos exposure at railroad worksites. 49 U.S.C. § 20106(a)(2). There is no express regulation or order with which a state tort lawsuit based upon could conflict. This Court found that Congress' use of the word "covering" within the first savings clause in § 20106(a)(2) has the effect of narrowing the scope of preemption. *Easterwood*, 507 U.S. at 664. The party claiming that railroad regulations preempt state law for a subject matter "must establish more than that they 'touch upon' or 'relate to' that subject matter, for 'covering' is a more restrictive term which indicates that pre-emption will lie only if the federal regulations substantially subsume the subject matter of the relevant state law." *Id.* (internal citation omitted). Since there are no federal regulations that "substantially subsume" the subject matter of Petitioners' tort claims against Respondents, the Third Circuit was wrong in holding that Petitioners' claims were preempted.

The FRA has never addressed asbestos, nor has it ever issued regulations on asbestos or in-shop safety. The word "asbestos" does not even appear in the FRA regulations, 49 C.F.R. §§ 200 through 268.[12] Prior to the adoption of the Occupational Safety and Health Act, the FRA left shop safety to the states to regulate. In 1978, after the creation of Occupational Safety and Health Administration ("OSHA"), the FRA stated that it would henceforth rely on OSHA to regulate workshop safety, and it so stated in 49 C.F.R.§ 221 (1978):

> We, therefore, believe that the FRA must exercise a continuing role in the area of railroad occupational safety and health. However, given the present staffing level for field investigation and inspection, the FRA has determined that, at this time, it would not be in the best interests of the public and of railroad safety for this agency to become involved extensively in the promulgation and enforcement of a complex regulatory scheme covering in minute detail, as do the OSHA standards, working conditions which, although located within the railroad industry, are in fact similar to those of any industrial workplace. Rather, we believe that the proper role for FRA in the area of occupational safety in the immediate future is one that will concentrate

12. The Fourth Circuit also noted this lack of regulation in 1976 in *Southern R.R. v. OSHRC*, 539 F.2d 335 (4th Cir. 1976), *cert. denied* 419 U.S. 999 (1976): "The Department of Transportation and FRA do not purport to regulate the occupational health and safety aspects of railroad offices or shop and repair facilities." 539 F.2d at 338.

> our limited resources in addressing hazardous working conditions in those traditional areas of railroad operations in which we have special competence.
>
> 49 C.F.R.§ 221 (1978).

The OSHA standards expressly do not preempt state law claims. The OSHA savings clause, 29 U.S.C. § 653(b)(4) (1970), states that nothing "...shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment."

Assuming *arguendo* that the Third Circuit's view of implied federal field preemption over railroad safety was correct, the railroad safety regulations could not preclude Petitioners' lawsuits. The FRA narrowed the field of federal regulation by excluding railroad shops from the ambit of its regulations. The federal railroad safety regulations can only preempt lawsuits regarding situations and parties to which the regulations apply. The regulations do not apply to repair shops. OSHA's regulations, which do not preempt state tort lawsuits, do apply. Consequently, the Third Circuit should not have affirmed summary judgment.

C. This Court should abandon implied federal field preemption.

To the extent that lower courts have erred by interpreting *Napier* in its broadest sense, that error can be corrected by this Court's abandonment of the doctrine of implied federal field preemption. *Napier* expressed the prevailing view of this Court in the late 19th century and early 20th century that when Congress acted within its powers in enacting a statute, the states could no longer regulate within the field of that statute. This Court held that any remedy for inadequate regulation must be addressed to the ICC, the federal agency that regulated the railroads in 1926. *Napier*, 272 U.S. at 613.

Despite the broad language of *Napier*, until recently the case was regarded by this Court as a conflict preemption case. In the years following *Napier*, the states began to share responsibility for railroad regulation, with the acquiescence, if not the support, of the ICC. Although the repair and maintenance facilities of the railroads were instrumental in the safety of locomotives and rolling stock, the ICC never regulated them. The various states did, however, exercise authority over those facilities. By the time that the FRSA was enacted in 1970, many state regulations regarding railroad safety were on the books. [13]

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13. The view of this Court regarding federal preemption had changed dramatically by the time the FRSA was adopted. *Compare Napier v. Atlantic C. Ry. Co.*, 272 U.S. 605 (1926), with *Terminal R. Ass'n v. Brotherhood of R. Trainmen*, 318 U.S. 1 (1943).

Petitioners attempted to persuade the Third Circuit that it should analyze the statutes and regulations involved in this case using the two-fold analysis this Court adopted in *Wyeth v. Levine*, — U.S. —, 129 S. Ct. 1187, 173 L. Ed. 2d 51 (2009), but the Third Circuit rejected Petitioners' suggestion in a footnote. This case presents this Court with the opportunity to prevent such error going forward by replacing implied federal field preemption with the express preemption and conflict preemption analysis this Court adopted in *Wyeth*.

In *Wyeth*, this Court held that federal courts should not presume that preemption was intended unless Congress clearly showed its desire to preempt:

> Our answer to that question must be guided by two cornerstones of our preemption jurisprudence. First, "the purpose of Congress is the ultimate touchstone in every preemption case." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996); *see Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103, 84 S. Ct. 219, 11 L. Ed. 2d 179 (1963). Second, "[i]n all preemption cases, and particularly in those in which Congress has 'legislated . . . in a field which the States have traditionally occupied,' . . . we 'start with the assumption that the historic police powers to the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Lohr*, 518 U.S., at 485, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (*quoting Rice v. Santa Fe Elevator Corp.*,

> 331 U.S. 218, 230, 67 S. Ct. 1146, 91 L. Ed. 1447 (1947)).
>
> 129 U.S. at 1194-1195, 173 L.Ed. at 60. (emphasis added).[14]

Applying the *Wyeth* two-fold analysis to the instant case, the first question is whether Congress demonstrated an intent to preempt state product warning requirements in railroad shops. Such intent must be viewed against the absence of regulations on the subject issues by the FRA, and the FRA's specific intent not to issue regulations. There is no express statement of preemption in the statute. The second question is whether state law either conflicts with or thwarts congressional purpose, or whether state law makes it impossible for the Respondents to comply with both federal railroad regulations and state failure-to-warn products liability law. *Id.* at 1196-1200, 173 L.Ed. at 62-66.

In *Wyeth*, this Court noted that Congress stated a clear intent to preempt state court law on product

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14. The Third Circuit stated that *Wyeth* was a conflict preemption case, and therefore not controlling in a field preemption case. This Court has observed more than once that field preemption is but a species of conflict preemption. *See Gade v. National Solid Waste Management Ass'n*, 505 U.S. 88, 102 n.2 (1992); *English v. General Elec. Co.*, 496 U.S. 72, 75 n.5 (1990). *Wyeth* itself relied on several field preemption cases, including *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996); *California v. ARC Am. Corp.*, 490 U.S. 93 (1989); and *Retail Clerks Int'l Ass'n v. Schermerhorn*, 375 U.S. 96 (1963).

warnings on vaccines [16] and tobacco.[17] Here, neither Congress nor the FRA has ever expressed such an intent regarding warnings about the hazards of asbestos products in railroad repair shops.[18] The Third Circuit failed to specify any federal regulation that conflicted with the state law on which Petitioners' *failure-to-warn* claim is based. There is simply nothing in the United States Code or the Code of Federal Regulations remotely incompatible with a state requiring a warning label of the danger of asbestos on a product package. Under *Wyeth*, Respondents had the burden to demonstrate that compliance with state tort law on warnings on the use of hazardous products actually conflicted with federal purposes, or would make it impossible for them to comply with federal regulations. *Wyeth*, 129 S. Ct. at 1203-1204, 173 L.Ed. 69-70. The Third Circuit failed to perform this required analysis.

It is respectfully suggested that the instant case offers this Court the opportunity to provide clarity by

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16. 42 U.S.C. § 300aa-22(b)(1) (1987).

17. 15 U.S.C. § 1334(b) (2009).

18. In *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), this Court found that even in areas of obvious field preemption, such as nuclear energy, state tort claims were not barred. Congress had to enact a specific statute in response to this Court's holding in *Silkwood* to preempt. Thus, in *Silkwood*, *Easterwood*, as well as in *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002), this Court has consistently applied the presumption against preemption, and held that in the absence of federal statutory or regulatory issuances covering the area, there was no preemption, particularly of state tort claims for injury.

dispensing with the outmoded notion of implied federal field preemption in favor of express preemption and conflict preemption.

CONCLUSION

For the reasons set forth above, Petitioners respectfully request that this Court grant their Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED SEPTEMBER 9, 2010

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 09-1634

GLORIA GAIL KURNS,
Executrix of The Estate of George M. Corson,

Deceased,

FREIDA E JUNG CORSON,
Widow In Her Own Right

v.

A.W. CHESTERTON INC., et al.; BOC INC., Airco Welders Supply Inc.; RAILROAD FRICTION PRODUCTS CORPORATION; VIAD CORP.

Gloria Gail Kurns; Freida E. Jung Corson,

Appellants.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(Civil No. 08-2216)
District Judge: Hon. Mitchell S. Goldberg

Argued January 11, 2010

Appendix A

Before: RENDELL, AMBRO, and CHAGARES, *Circuit Judges*

Filed September 9, 2010

OPINION

CHAGARES, *Circuit Judge.*

Appellants Gloria Gail Kurns and Freida E. Jung Corson brought suit on behalf of the decedent, George M. Corson, asserting a number of state law causes of action related to his alleged exposure to asbestos during his years employed by a railroad company. While the suit was filed in state court, the matter was removed to federal court on the basis of diversity jurisdiction, and the District Court granted the appellees Viad Corporation and Railroad Friction Products Corporation's motions for summary judgment, holding that the plaintiffs' claims were all preempted by the Locomotive Inspection Act, 49 U.S.C. § 20701, *et seq.* ("LIA"). The plaintiffs appeal from the District Court's entry of summary judgment on behalf of the appellees and argue that their claims are not preempted by federal law. For the reasons set forth below, we will affirm.

I.

From 1947 to 1994, George M. Corson (the "decedent") worked as a welder, machinist, and supervisor for the Chicago, Milwaukee, St. Paul, & Pacific Railroad. He was employed at different facilities

in Montana and South Dakota. Much of his job involved removing insulation from locomotive boilers and putting brake shoes on the locomotives. The plaintiffs claim that throughout this time period, the decedent was repeatedly exposed to asbestos from the insulation and the brake shoes. After his retirement, the decedent was diagnosed with malignant mesothelioma, the only known cause of which is exposure to asbestos. He passed away after the initiation of this litigation, and is represented by both his widow and the executor of his estate.

The plaintiffs sued the two appellees, as well as a number of other defendants (fifty-nine defendants in all), in Pennsylvania state court, seeking to recover compensatory and punitive damages for the harmful effects to the decedent's health resulting from his exposure to asbestos. The plaintiffs alleged that the decedent installed brake pads containing asbestos that were manufactured and sold by Railroad Friction Products Corporation ("RFPC"). They further alleged that Viad was a successor in interest to a different company that manufactured and sold engine valves, also containing asbestos, which the decedent installed. Viad moved for summary judgment on the grounds that the plaintiffs' claims were preempted by federal law, but the state court denied that motion. All of the defendants then moved for summary judgment on the grounds that there was insufficient evidence linking their products to the decedent's exposure to asbestos. The state court granted these motions with regard to all of the defendants except Viad and RFPC.

Appendix A

The plaintiffs brought this case in state court because one of the other original defendants defeated diversity jurisdiction, but when the state court granted that defendant's motion for summary judgment and that party was released from the case, there was complete diversity of citizenship between the parties. At that point, Viad and RFPC removed the case to the District Court. Once in federal court, the defendants again filed a motion for summary judgment on the grounds that the plaintiffs' claims were preempted by federal law.

On February 5, 2009, the District Court granted summary judgment in favor of RFPC and Viad, holding that the plaintiffs' state law product liability tort claims were preempted by federal law, namely the LIA.[1] The District Court held that the LIA occupies the field of regulating locomotives and locomotive parts used in interstate commerce based on the Supreme Court's decision in *Napier v. Atlantic Coast Line Railroad Co.*, 272 U.S. 605, 613, 47 S. Ct. 207, 71 L. Ed. 432 (1926), in which the court explained that the LIA occupies the field

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1. The LIA provides, *inter alia*, that:

> A railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances —
>
> (1) are in proper condition and safe to operate without unnecessary danger of personal injury.

49 U.S.C. § 20701.

of locomotive equipment.[2] The District Court rejected the plaintiffs' contention that federal law only preempted state regulations involving locomotives which were "in use" at the time, and that since their case involved the actual installation, repair, and removal of locomotive parts, federal preemption did not apply. The Court held that there was no indication in the law that Congress intended to make such a distinction. Finally, the Court rejected the plaintiffs' claim that the Federal Railroad Safety Act ("FRSA") materially abrogated the scope of federal preemption of the entire field of railroad parts. The Court held that the FRSA had not changed the scope of LIA preemption to such an extent that it would no longer preempt the plaintiffs' claims.

The plaintiffs filed a timely appeal from the District Court's order.

II.

The District Court had diversity jurisdiction over this matter pursuant to 28 U.S.C. § 1332(a)(1). This Court has jurisdiction under 28 U.S.C. § 1291. We review a district court's order granting summary judgment under a plenary standard of review. *Curley v. Klem*, 298

2. The District Court noted that other district courts in our circuit have reached similar conclusions. *See, e.g., Consol. Rail Corp. v. Pa. Pub. Util. Comm'n*, 536 F. Supp. 653, 655 (E.D. Pa. 1982) (holding that the LIA preempts the field of locomotive equipment and therefore states cannot regulate speed recorders in locomotives), *aff'd mem.*, 696 F.2d 981 (3d Cir. 1982).

F.3d 271, 276 (3d Cir. 2002). Summary judgment is appropriate when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). When reviewing a grant of summary judgment, we view all evidence in the light most favorable to the non-moving party, and will affirm only if there is no genuine issue of material fact. *Startzell v. City of Phila.*, 533 F.3d 183, 192 (3d Cir. 2008).

III.

On appeal, the plaintiffs contend that state law design defect and failure to warn product liability claims are not preempted by the LIA. The plaintiffs urge that the LIA preempts the regulation of locomotive equipment, but does not preempt "railroad workers' personal injury claims under state tort law for failure to warn about hazardous substances released during the repair of locomotives which [are] not in service." Plaintiffs' Br. at 19. We disagree and hold that the plaintiffs' claims are preempted by the LIA.

A.

We first turn to the plaintiffs' contention that the LIA does not preempt a state law or regulation related to working conditions in a facility that manufactures, installs, repairs, or removes locomotive parts and appurtenances.

Appendix A

The doctrine of preemption is grounded in the Supremacy Clause of Article VI of the Constitution, which provides that "the Laws of the United States . . . shall be the supreme Law of the Land." U.S. Const. art. VI. Under that clause, "any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield." *Free v. Bland*, 369 U.S. 663, 666, 82 S. Ct. 1089, 8 L. Ed. 2d 180 (1962). In cases like the present one, courts are called upon to determine whether an act of Congress preempts state law. *See Deweese v. Nat'l R.R. Passenger Corp.*, 590 F.3d 239, 245 (3d Cir. 2009).

There are three distinct types of federal preemption: express preemption, implied conflict preemption, and field preemption. *Hillsborough Cnty., Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713, 105 S. Ct. 2371, 85 L. Ed. 2d 714 (1985); *Bruesewitz v. Wyeth Inc.*, 561 F.3d 233, 238-39 (3d Cir. 2009). Express preemption occurs when a federal law contains express language providing for the preemption of any conflicting state law. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541, 121 S. Ct. 2404, 150 L. Ed. 2d 532 (2001). Implied conflict preemption occurs when it is either "impossible for a private party to comply with both state and federal requirements, or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *English v. Gen. Elec. Co.*, 496 U.S. 72, 79, 110 S. Ct. 2270, 110 L. Ed. 2d 65 (1990) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S. Ct. 399, 85 L. Ed. 581 (1941) (citation omitted)). The final type of preemption, which is relevant to this

case, is field preemption, which arises when a state law or regulation intrudes upon a "field reserved for federal regulation." *United States v. Locke*, 529 U.S. 89, 111, 120 S. Ct. 1135, 146 L. Ed. 2d 69 (1990).

When determining whether a federal law or laws serve to preempt an entire field, "[o]ur inquiry into the scope of a statute's pre-emptive effect is guided by the rule that '[t]he purpose of Congress is the ultimate touchstone in every pre-emption case.'" *Altria Group, Inc. v. Good*, 555 U.S. 70, 129 S. Ct. 538, 543, 172 L. Ed. 2d 398 (2008) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996)); *see also Deweese*, 590 F.3d at 246. In doing so, we consider the intended purpose of the federal regulatory scheme, and what impact any state regulation would have on that scheme. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373-74, 120 S. Ct. 2288, 147 L. Ed. 2d 352 (2000). The Supreme Court has recognized that there is a presumption against field preemption unless congressional intent to preempt is clear and manifest. *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992).

The LIA[3] was originally passed in 1911, and was amended in 1915 and 1924. In pertinent part, it provides

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3. The LIA was originally known as the Boiler Inspection Act, or BIA, and is referred to as such in much of the case law cited and quoted throughout this opinion. We simply note that this is a distinction without a difference, and both terms refer to 49 U.S.C. § 20701, *et seq.*

that "[a] railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances — (1) are in proper condition and safe to operate without unnecessary danger of personal injury . . . ." 49 U.S.C. § 20701. While the statute itself is silent as to any preemptive effect, one can easily understand how a state law or action which regulates whether a locomotive or any of its parts and appurtenances "are in proper condition and safe to operate" could conflict with federal safety regulations.

The Supreme Court has explicitly addressed the question of the scope of LIA preemption. In *Napier*, the Court held that "the power delegated to the [Interstate Commerce] Commission[4] by the Boiler Inspection Act as amended is a general one. It extends to the design, the construction and the material of every part of the locomotive and tender and of all appurtenances."[5] 272

4. The LIA initially conferred regulatory authority over the construction and material of locomotives and appurtenances to the Interstate Commerce Commission. That regulatory authority has since been transferred to the Department of Transportation. 45 U.S.C. § 28.

5. In a later decision, the Court defined the scope of "every part of the locomotive and tender and of all appurtenances" as "[w]hatever in fact is an integral or essential part of a completed locomotive, and all parts or attachments definitely prescribed by lawful order of the Interstate Commerce Commission." *S. Ry. Co. v. Lunsford*, 297 U.S. 398, 402, 56 S. Ct. 504, 80 L. Ed. 740 (1936).

(Cont'd)

U.S. at 611. The Court went on to "hold that state legislation is precluded, because *the Boiler Inspection Act, as we construe it, was intended to occupy the field.* The broad scope of the authority conferred upon the Commission leads to that conclusion." *Id.* at 613 (emphasis added).[6] The Court also specifically noted that the delegation of powers to a federal agency meant that any state law in that area was preempted, regardless of whether the agency actually exercised those powers:

(Cont'd)

The plaintiffs urge that the LIA only governs "on the road injuries" and is irrelevant when a locomotive is not "in use." Plaintiffs' Br. at 20. The plaintiffs are correct that *liability* under the LIA only exists if the locomotive was in use at the time of the accident. *See Crockett v. Long Island R.R.*, 65 F.3d 274, 277 (2d Cir. 1995). Here, however, the plaintiffs are not asserting or contesting liability under the LIA. But even if the fact that the locomotive parts and appurtenances that allegedly contained asbestos in the present case were not connected to a locomotive which was in transit at the time of exposure prevents the plaintiffs from bringing an action under the LIA, there are other federal causes of action available for such a claim, as discussed *infra*. This has no impact on the scope of preemption.

6. We are of course bound by a direct holding of the Supreme Court of the United States. To the extent that the plaintiffs argue that more recent decisions of the Supreme Court imply that the Court may now view this issue differently, we simply note that the Supreme Court has held that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989).

> It is also urged that, even if the Commission has power to prescribe an automatic firebox door and a cab curtain, it has not done so; and that it has made no other requirement inconsistent with the state legislation. This, also, if true, is without legal significance. The fact that the Commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the act delegating the power.

Id. The Court also explicitly addressed the issue of congressional intent, holding that although the original LIA did not show that Congress intended federal law to preempt the entire field, it was clear from the law as amended that this was precisely what Congress intended. *Id.* at 611.[7]

Thus, the LIA preempts a broad field relating to the health and safety of railroad workers, including requirements governing the design and construction of locomotives, as well as equipment selection and installation. *Id.* at 611-12; *see also Urie v. Thompson*, 337 U.S. 163, 191-93, 69 S. Ct. 1018, 93 L. Ed. 1282 (1949)

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7. The plaintiffs engage in a lengthy discussion of implied conflict preemption under *Wyeth v. Levine*, 129 S. Ct. 1187, 173 L. Ed. 2d 51 (2009). Implied conflict preemption occurs when Congress has not displaced all state law in an area, but state law actually conflicts with federal law. *Fellner v. Tri-Union Seafoods, L.L.C.*, 539 F.3d 237, 243 (3d Cir. 2008). Because we find that field preemption under the LIA bars the plaintiffs' claims, we need not analyze implied conflict preemption.

(holding that the LIA covers claims relating to railroad employees' health, including diseases as well as accidents); *Oglesby v. Del. & Hudson Ry. Co.*, 180 F.3d 458, 460 (2d Cir. 1999) ("Through [the LIA] and other acts, [Congress] conferred on the Interstate Commerce Commission (and now the Department of Transportation) full authority over virtually all aspects of locomotive safety to the exclusion of the states."); *Law v. Gen. Motors Corp.*, 114 F.3d 908, 910 (9th Cir. 1996) ("It has long been settled that Congress intended federal law to occupy the field of locomotive equipment and safety, particularly as it relates to injuries suffered by railroad workers in the course of their employment.").

Here, the brake pads and engine valves that allegedly caused asbestos exposure during installation are clearly locomotive equipment and are therefore within the scope of the LIA. *See Oglesby*, 180 F.3d at 461 (holding that an engineer's seat in a locomotive is obviously within the scope of the LIA). The plaintiffs concede that regulations regarding locomotive equipment are preempted by the LIA, but contend that this preemption does not bar state tort law product liability claims, including failure-to-warn claims, arising from the installation of locomotive parts. However, we find that the plaintiffs' claims "fall[ ] squarely within the field of employment hazards that the [LIA] was intended to cover." *Id.* at 462.

The goal of the LIA is to "prevent the paralyzing effect on railroads from prescription by each state of the safety devices obligatory on locomotives that would pass through many of them." *Id.* at 461 (quotation marks

omitted); *see also Law*, 114 F.3d at 910 ("The virtue of uniform national regulation 'is self-evident: locomotive companies need only concern themselves with one set of equipment regulations and need not be prepared to remove or add equipment as they travel from state to state.'" (quoting *S. Pac. Transp. Co. v. Pub. Util. Comm'n of Or.*, 9 F.3d 807, 811 (9th Cir. 1993))). In order to accomplish this goal, suits against manufacturers of locomotive parts for product liability claims should be included in the scope of the LIA's field preemption, particularly because the LIA governs both the design and the construction of a locomotive's parts.[8] *See Oglesby*, 180 F.3d at 462 ("[T]he results that Congress had hoped to obtain through the [LIA] would be accomplished best by including the manufacturer within the statute's coverage.").

If each state had its own standards for liability for railroad manufacturers, equipment would have to be

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8. The plaintiffs also argue that even if this Court holds that their negligence and other state law claims are preempted by the LIA, their claim for failure to warn is not preempted because it involves a failure to place a warning label on some of the products in question, and does not directly involve the parts and appurtenances themselves. This is merely an attempt at artful pleading. The gravamen of the plaintiffs' claim is still that the decedent suffered harmful consequences as a result of his exposure to asbestos contained in locomotive parts and appurtenances. The plaintiffs may not merely rebrand a claim in order to avoid preemption. *See Oglesby*, 180 F.3d at 461 (rejecting a plaintiff's attempt to differentiate failure to warn cause of action from other product liability claims, calling it "a distinction without a difference"); *see also Law*, 114 F.3d at 910-13 (treating failure to warn claim as a product liability claim).

designed so that it could be changed to fit these standards as the trains crossed state lines, or adhere to the standard of the most restrictive states. *First Sec. Bank v. Union Pac. R.R. Co.*, 152 F.3d 877, 880-81 (8th Cir. 1998); *Law*, 114 F.3d at 910-11; *cf. British Airways Bd. v. Port Auth. of N.Y. & N.J.*, 558 F.2d 75, 83 (2d Cir. 1977) (holding that if states were allowed to pass laws or regulations impacting the airline industry, "[t]he likelihood of multiple, inconsistent rules would be a dagger pointed at the heart of commerce"). Congress's goal of uniform railroad equipment regulation would clearly be impeded by state product liability suits against manufacturers, the purpose of which is, in part, to persuade defendants to comply with a standard of care established by the state. *See Law*, 114 F.3d at 911. Furthermore, there is "no doubt" that the design of locomotive parts and warning requirements are within the scope of the Secretary of Transportation's authority. *Id.* As the Court of Appeals for the Ninth Circuit has observed:

> The [LIA] preempts any state action that would affect the "design, the construction, and the material" of locomotives. *Napier*, 272 U.S. at 611. Imposing tort liability on railroad equipment manufacturers would do just that, by forcing them to conform to design and construction standards imposed by the states. This would transfer the regulatory locus from the Secretary of Transportation to the state courts — a result the [LIA] was clearly intended to foreclose.

Id. at 911-12.

While no federal court of appeals has faced the precise issue of whether the LIA preempts state law causes of action arising out of workplace exposure to asbestos in the course of manufacturing or working with railroad parts, the highest courts in a number of states have considered this issue, and those courts have unanimously held such claims to be preempted. *See, e.g., Darby v. A-Best Prods. Co.*, 102 Ohio St. 3d 410, 2004 Ohio 3720, 811 N.E.2d 1117, 1125-26 (Ohio 2004); *In re W. Va. Asbestos Litig.*, 215 W. Va. 39, 592 S.E.2d 818, 822 (W. Va. 2003); *Gen. Motors Corp. v. Kilgore*, 853 So. 2d 171, 176-80 (Ala. 2002); *Scheiding v. Gen. Motors Corp.*, 22 Cal. 4th 471, 93 Cal. Rptr. 2d 342, 993 P.2d 996, 998-1004 (Cal. 2000). The Supreme Court of West Virginia, after conducting an exhaustive survey of the relevant case law, concluded:

> In spite of the strong presumption against federal preemption . . . . an overwhelming body of case law persuades us that, through passage of the Boiler Inspection Act, Congress has occupied the field of railroad safety so pervasively that plaintiffs' claims against the defendants are preempted. We do not reach this conclusion lightly, but find any other path blocked by an avalanche of adverse authority from other jurisdictions, both state and federal.

In re W. Va. Asbestos Litig., 592 S.E.2d at 822 (footnote omitted).

We agree with the vast majority of courts that have been called upon to decide the issue of the scope of LIA preemption. In *Napier*, the Supreme Court clearly held that in its amendments to the LIA, Congress intended to preempt all state laws, regulations, and causes of action which involve "the design, the construction, and the material of every part of the locomotive and tender of all appurtenances." 272 U.S. at 611. The plaintiffs' claims undeniably involve the material used in locomotive parts, both of which fall under the definition of "parts and appurtenances" of locomotives, *S. Ry. Co. v. Lunsford*, 297 U.S. 398, 402, 56 S. Ct. 504, 80 L. Ed. 740 (1936), and therefore are preempted by federal law. *See Napier*, 272 U.S. at 611.

We agree with the District Court's determination that Congress's intent in enacting and amending the LIA was to preempt completely the field of railroad parts and appurtenances, and that the locomotive components which are the subject of the plaintiffs' product liability action undoubtedly fall within that category.

B.

The plaintiffs urge that the LIA does not purport to encompass the field of safety in the manufacture of locomotives because the Occupational Health and Safety Act of 1970, 29 U.S.C. § 651, *et seq.*, governs working conditions in a repair shop. However, the plaintiffs' claims do not involve hazardous working conditions. Instead, the plaintiffs assert product liability claims (failure to warn and design defect claims) against the

manufacturers of certain locomotive parts that allegedly contained asbestos. "Working conditions" refers to the "environmental area in which an employee customarily goes about his daily tasks." *Columbia Gas of Pa., Inc. v. Marshall*, 636 F.2d 913, 916 (3d Cir. 1980) (quotation marks omitted). We also note that the District Court pointed out the difference between claims involving railroad working conditions, *see Terminal R.R. Ass'n of St. Louis v. Bhd. of R.R. Trainmen*, 318 U.S. 1, 2, 63 S. Ct. 420, 87 L. Ed. 571 (1943) (upholding an Illinois law requiring cabooses), and a claim, as here, emanating from the material used to construct locomotive parts.

Further, we note that federal law offers recourse to workers exposed to asbestos under the Federal Employer's Liability Act ("FELA"), 45 U.S.C. § 51, *et seq.*, which provides a federal cause of action for any railroad employee injured on the job due to employer negligence. Contrary to the plaintiffs' claims, LIA and FELA provide a broad, reasonable, and comprehensive legal framework under which railroad industry employees injured by employer negligence may seek damages. *See Law*, 114 F.3d at 912 (discussing the availability of claims brought under FELA as recourse for injuries suffered by railroad industry employees in the course of their employment). FELA has been recognized as the appropriate avenue of relief in several of the state supreme court cases discussed *supra*, which held that tort claims claiming asbestos exposure and seeking recourse under state law were preempted by the LIA. *See, e.g., In re W. Va. Asbestos Litig.*, 592 S.E.2d at 822, n.2; *Scheiding*, 993 P.2d at 1001.

C.

The plaintiffs also argued before the District Court, adopting the reasoning of the Pennsylvania Supreme Court in *Norfolk & Western Railway Co. v. Pennsylvania Public Utility Commission*, 489 Pa. 109, 413 A.2d 1037 (Pa. 1980), that the FRSA narrowed the scope of the LIA's preemption of state laws and regulations regarding locomotive equipment. We disagree.

The *Norfolk & Western* decision is the lone exception to the nearly unanimous interpretation of the breadth of LIA preemption. In *Norfolk & Western*, the Supreme Court of Pennsylvania rejected the assertion that the LIA completely preempted the field of railroad equipment. 489 Pa. 109, 413 A.2d 1037. The court held that "[w]hile the broad language of the Act at one time could have been interpreted as reflecting Congressional intent to preempt the entire field of railroad safety, the enactment of section 205 of the Federal Railroad Safety Act in 1970 (FRSA) no longer permits that reading." *Id.* at 1043. Section 205, in relevant part, provided that "[a] state may adopt or continue in force any law, rule, regulation, order or standard relating to railroad safety until such time as the Secretary (of Transportation) has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement." 45 U.S.C. § 434. The court held that in certain circumstances this statute enabled states to enact rules which regulated railroad safety.

Significantly, however, no court outside of Pennsylvania has followed this ruling or its reasoning. Just two years after *Norfolk & Western* was decided, in fact, a federal district court in Pennsylvania explicitly rejected *Norfolk & Western* as being incompatible with *Napier. Consol. Rail Corp. v. Pa. Pub. Util. Comm'n*, 536 F. Supp. 653 (E.D. Pa. 1982), *aff'd mem.*, 696 F.2d 981 (3d Cir. 1982) (table opinion). That court, noting that the express purpose of the FRSA was to maintain broad federal regulatory authority and ensure nationwide uniformity of locomotive standards, held:

> [I]n areas already governed by the Locomotive Inspection Act, the states had no regulations. If the Railroad Safety Act were to change the preemption test for those areas, the states could expand their regulatory authority, allowing a new reservoir of differing, and possibly incompatible, railroad-safety law. This would run counter to Congress's purpose of uniform national regulation. It is contrary to Congress's purpose in passing the Railroad Safety Act to allow the states to reoccupy fields from which they previously had been displaced. Thus, I conclude that Congress did not intend the preemption provision of the Railroad Safety Act to modify the total-preemptive effect of the Locomotive Inspection Act.

Id. at 656-57 (footnotes omitted). We similarly reject the reasoning of the *Norfolk & Western* court, and agree that *Napier* compels a holding of preemption.

As previously noted, when determining whether a state law cause of action is preempted, our "'ultimate touchstone'" is Congress's purpose in passing a certain law. *Altria Group, Inc.*, 129 S. Ct. at 543 (quoting *Medtronic, Inc.*, 518 U.S. at 485). While the plaintiffs assert that Congress's purpose in passing § 205 was to allow increased state regulation over railroad safety, this is flatly contradicted by the language of the statute itself, which provides that "[l]aws, regulations, and orders related to railroad safety . . . shall be nationally uniform to the extent practicable." 49 U.S.C. § 20106(a). The Act authorizes the Secretary of Transportation to "prescribe regulations and issue orders *for every area of railroad safety* . . . ." 49 U.S.C. § 20103(a) (emphasis added). We hold that in passing the FRSA, Congress did not intend it to disturb the existing framework of federal preemption of the railroad industry established by the LIA.

The FRSA has had no impact on the Department of Transportation's oversight of locomotive-related workplace safety issues. The Federal Railroad Administration ("FRA"), an agency within the Department of Transportation, has specifically investigated and addressed the question of asbestos in locomotive components, and concluded that the "FRA does not feel that further action with respect to the presence of asbestos in locomotive cabs is warranted at this time." Federal Railroad Admin., U.S. Dep't of Transp., Rep. To Congress, Locomotive Crashworthiness and Cab Working Conditions (Sept. 1996) at 10-12.

Because the express purpose of the FRSA was to maintain, not decrease, federal uniform regulation of the railroad industry, we reject the rationale of the Supreme Court of Pennsylvania's *Norfolk & Western* opinion, and reject the plaintiffs' argument that the FRSA narrowed the scope of LIA preemption as it applies to product liability claims arising out of locomotive parts and appurtenances.

IV.

For these reasons, we will affirm the judgment of the District Court.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSLVANIA FILED FEBRUARY 3, 2009

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KURNS, et al.,

Plaintiffs,

v.

A.W. CHESTERTON, et al.,

Defendants.

CIVIL ACTION NO. 08-2216

OPINION

GOLDBERG, J.

February 3, 2009

This case involves state law tort claims brought by plaintiffs, George Corson, and his wife, Freda Jung Corson, alleging that Mr. Corson had been exposed to asbestos products over the course of his twenty-eight year career as a machinist/welder for the Milwaukee

Road Railroad.[1] The lawsuit asserts that Mr. Corson, who passed away subsequent to the filing of the complaint, contracted mesothelioma through exposure to defendants' products.

Presently before the Court are defendants' Motions for Summary Judgment, which assert that plaintiff's claims for products liability and negligence are preempted by federal law.[2] Plaintiff contends that preemption does not apply and further argues that this Court is bound by a Pennsylvania state court's previous denial of summary judgment in this case. For the reasons stated herein, defendants' motions will be granted.

I. PROCEDURAL HISTORY

On June 13, 2007, plaintiffs initiated suit in the Philadelphia County Court of Common Pleas against fifty-nine defendants. On January 29, 2008, Mr. Corson died from mesothelioma, a cancer that his expert attributed to his lifelong occupational exposure to asbestos and asbestos-containing products. On May 13,

1. Mr. Corson was employed with Milwaukee Road Railroad (now Canadian Pacific Railroad) from January 1, 1947 - February 1, 1974. At all times he worked as a machinist/welder and was stationed in various cities within the state of Montana. (Pl.'s Complaint, p. 9).

2. Both defendants claim that plaintiff cannot identify their products as having been the source of asbestos exposure which contributed to plaintiff contracting mesothelioma. However, neither defendant included this argument in their Motions for Summary Judgment other than to preserve the issue.

2008, the case was removed to this Court. As the remaining plaintiff, Mrs. Corson seeks in excess of $ 50,000 in compensatory and punitive damages.[3]

Presently, the only remaining defendants are Railroad Friction Products Corporation [hereinafter "RFPC"] and Viad Corporation [hereinafter "Viad"]. Plaintiff alleges that RFPC manufactured/sold brake pads containing asbestos that were installed by plaintiff. Plaintiff further alleges that Viad was a successor in interest to Baldwin Locomotive, which manufactured/sold engine valves, also installed by plaintiff. The locomotive products plaintiff allegedly came in contact with - brake pads and engine valves, and the work plaintiff performed as a machinist/welder, are important factors in resolving the pending motions.

II. STANDARD OF REVIEW

This court must view the evidence presented by the parties in the light most favorable to the plaintiff, the non-moving party in this instance. *Big Apple BMW, Inc. v. BMW of N. Am., Inc.* 974 F.2d 1358, 1363 (3d Cir. 1992). If, after examining "the pleadings, the discovery and disclosure materials on file, and any affidavits," the court finds there is "no genuine issue as to any material fact," then "the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving parties

3. Punitive damages in asbestos cases consolidated under MDL 875 in this District, have been bifurcated, and are not subject to adjudication at this time.

must carry the burden of showing that there is no genuine issue of material fact, entitling the defendants to summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). If the defendants are able to meet their burden, the plaintiffs must go beyond the pleadings to set forth "specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e)(2).

A motion for summary judgment must be granted against a party that fails to establish the existence of an element essential to that party's case, because such a failure as to an essential element necessarily renders all other facts immaterial. *Celotex Corp.*, 477 U.S. at 322-23. If there is only one reasonable conclusion from the record regarding the potential verdict under the governing law, summary judgment must be awarded to the moving party. *Id.*

III. DISCUSSION

A. Federal Preemption

Federal preemption is premised upon the Supremacy Clause of the United States Constitution, which states, "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land. . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. U.S. Const. art. VI, cl. 2. The Supreme Court has interpreted

the Supremacy Clause as invalidating all state laws that interfere with, or are contrary to, federal law. *Hillsborough County v. Automated Med. Labs.*, 471 U.S. 707, 712, 105 S. Ct. 2371, 85 L. Ed. 2d 714 (1985) (quoting *Gibbons v. Ogden*, 22 U.S. 1 (9 Wheat. 1, 211, 6 L. Ed. 23), (1824)). As a result, a federal preemption analysis always starts with a question of congressional intent, and then proceeds to a discussion of state law interaction with the federal law or regulation. *English v. Gen. Elec. Co.*, 496 U.S. 72, 78-79, 110 S. Ct. 2270, 110 L. Ed. 2d 65 (1990). *See also Medtronic v. Lohr*, 518 U.S. 470, 485, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996) ('[t]he purpose of Congress is the ultimate touchstone' in every preemption case).

Defendants RFPC and Viad maintain that they are entitled to summary judgment because Congress intended to occupy the field of regulation regarding locomotives and locomotive parts and equipment. Both defendants rely on the Boiler Inspection Act, 49 U.S.C. § 20701, (now known as the Locomotive Inspection Act, but historically referred to as the "BIA") as the statute that Congress intended to preempt all state law regulating locomotives and locomotive parts used in interstate commerce. (Defs. RFPC and Viad's Memo. of Law in Support of Mot. for Sum. J., pp. 2, 11).

In pertinent part, the BIA states: "A railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances - (1) are in proper condition and safe to operate without unnecessary danger of

personal injury." 49 U.S.C. § 20701 (1994). The Supreme Court has held that the BIA (along with the "Safety Appliance Act"[4], or "SAA") was enacted to serve the congressional purpose of protecting "employees and others by requiring the use of safe equipment" in conjunction with the operation of railroads. *Urie v. Thompson*, 337 U.S. 163, 69 S. Ct. 1018, 93 L. Ed. 1282, at n.20 (1949).

In *Napier v. Atlantic Coast Line R.R. Co.*, 272 U.S. 605, 613, 47 S. Ct. 207, 71 L. Ed. 432 (1926), the Supreme Court considered several state statutes regulating firebox doors and cab curtains in locomotive engines. The Court found that the state laws were preempted by federal law because Congress intended that the BIA would regulate "the equipment of locomotives." *Id.* at 612. The Supreme Court struck down the state law, reasoning that:

> [T]he power delegated to the [Interstate Commerce] Commission by the Boiler Inspection Act as amended is a general one. It extends to the design, the construction and the material of every part of the locomotive and tender and of all appurtenances.... We hold that state legislation is precluded because the Boiler Inspection Act, as we construe it, was intended to occupy the field.

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4. Codified at 49 U.S.C. §§ 20301 *et seq*, the SAA regulates all rail cars, locomotives, tenders or similar vehicles. 49 U.S.C. § 20301(a) (1996).

Id. at 611-13. Here, because plaintiff alleges that Mr. Corson contracted mesothelioma through his contact with locomotive equipment, the reasoning and holding of *Napier* plainly applies.

Napier has been cited and relied upon by Judges in this District facing the same issue. For instance, in *D'Amico v. Garlock*, No. 92-5544, 2007 U.S. Dist. LEXIS 67664 at *2 (E.D. Pa. Sept. 13, 2007)(O'Neill, J), the plaintiff brought state common-law tort claims alleging that he contracted mesothelioma while working as a welder. Plaintiff contended that preemption was inapplicable, and argued that the BIA applied only to railroad carriers and not manufacturers. In reasoning that the preempted field extended to railroad manufacturers, the Court cited to *Napier* as preempting any state action that affects "the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances." *Id.* at *15 *quoting Napier*, 272 U.S. at 611.[5] The holding of *D'Amico* applies to the instant case, where the brake pads and engine valves at issue are "material" and/or "appurtenances" of a locomotive.

Napier was also relied upon in *Consolidated Rail Corporation v. Pennsylvania Public Utility Commission*, 536 F. Supp. 653, 655 (E.D. Pa. 1982) (Giles,

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5. The *D'Amico* decision also rejected the argument that the BIA only applies to locomotives which were "in use" and not "in the shop." *D'Amico*, 2007 U.S. Dist. LEXIS 67664 at *18-*19, (discussed *infra* at p. 8).

J.)[6] where a railroad sued the Pennsylvania Public Utility Commission seeking a declaration that a state statute regulating speed recorders and indicators in locomotives was preempted by the BIA and the Federal Railroad Safety Act. The state argued, as plaintiff does here, that federal laws passed after the BIA, such as the Railroad Safety Act, "redistributed railroad regulatory authority so that the total preemption test of the Locomotive Inspection Act [BIA] is no longer valid." *Id.* at 654. In interpreting *Napier*, the court rejected this argument and stated that "Congress intended the Locomotive Boiler Inspection Act to occupy *totally* the field of locomotive equipment." *Id.* at 655 (emphasis added). The court further stressed that validating the state regulation would be "contrary to Congress's purpose in passing the Railroad Safety Act." *Id.* at 657.

In an effort to deflect the holding in *Napier*, and precedent referenced above, plaintiff raises three arguments: 1) The Supreme Court case of *Terminal Railroad v. Brotherhood of Railroad Trainmen*, 318 U.S. 1, 2, 63 S. Ct. 420, 87 L. Ed. 571 (1943), which involved railroad working conditions and decided after *Napier*, precludes preemption; 2) Because the BIA exclusively regulates locomotives "in use" and not in repair, preemption is not applicable; and 3) The Federal Railroad Safety Act, 49 U.S.C. §§ 20101-20144, (hereinafter "FRSA"), effectively repealed or restricted

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6. *Consolidated* was summarily affirmed by both the Third Circuit, 696 F.2d 981 (3d Cir. 1982), and the Supreme Court, 461 U.S. 912, 103 S. Ct. 1888, 77 L. Ed. 2d 280 (1983).

the BIA. These arguments are unpersuasive and addressed below.

First, plaintiff's reliance on *Terminal Railroad*, is misplaced because the state statute at issue there involved working conditions and not, as in this case, "parts" or "appurtenances." Specifically, in *Terminal Railroad*, an Illinois law required cabooses so that rear switchmen were not forced to ride the tops, sides or draw-bars of the rear cars. *Id.* The Court ruled that the Illinois law was a valid regulation, not subject to preemption as it involved the field of regulating working conditions. *Id.* at 8. These circumstances are much different than the facts before this Court which involve claims emanating from work with the material of locomotive parts, an area clearly preempted by Congress through the BIA. *See also*, *Urie v. Thompson*, 337 U.S. 163, 193, 69 S. Ct. 1018, 93 L. Ed. 1282 (1949) (applicable standard of care under the Federal Employer's Liability Act ("FELA"), which creates a statutory remedy for workers harmed from working on locomotives, is determined under the BIA).

Plaintiff next argues that the BIA applies only to locomotives "in use," and not as in plaintiff's case, to locomotives or locomotive parts that are being repaired or prepared for use. (Pl.'s Answer to RFPC's Mot. for Sum. J., p. 3). The Honorable Thomas O'Neill, of this Court, addressed this issue in *D'Amico*, 2007 U.S. Dist. LEXIS 67664 at *1, noting that cases which define when a locomotive is "in use" stem from lawsuits brought under the BIA. *Id.*, *quoting Crockett v. Long Island*

R.R., 65 F.3d 274, 277 (2d Cir. 1995). In *D'Amico*, the "in use" distinction was found to be inapplicable to a preemption analysis because the plaintiff was seeking relief under state law, and not the BIA. Thus, Judge O'Neill properly concluded that "because the BIA preempts the entire field of locomotive equipment, the question of whether decedent was exposed to asbestos from locomotives in use or not in use is irrelevant." *D'Amico*, 2007 U.S. Dist. Lexis 67664 at *19. In fact, all of the cases cited by plaintiff in support of the "in use" argument deal not with state law claims but rather allegations brought against railroad companies under the BIA. (Pl.'s Answer to RFPC's Mot. for Sum. J., p. 3). As plaintiff is seeking relief pursuant to state law tort claims and not the BIA, the issue of whether the locomotive was "in use" or not is inapplicable.

Finally, plaintiff argues that the state law claims are not preempted because the Federal Railroad Safety Act (FRSA), 49 U.S.C. § 20109 (2007), overruled the *Napier*/BIA preemption test, and allowed state law to govern railroads and locomotives. (Pl.'s Answer to Viad's Mot. for Sum. J., p. 4). Additionally, plaintiff argues that the 2007 amendments to the FRSA[7] apply to this case, further chipping away at the field preempted by the BIA. (Pl.'s Answer to RFPC's Mot. for Sum. J., p. 4).

Plaintiff correctly notes that in undertaking to expand the field for federal regulation regarding railroad

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7. *Federal Railroad Safety Act*, 49 U.S.C. §20106 (2007) (Amendments effective in September 2007, specifically deemed retroactive from January 18, 2002).

safety, the FRSA announced a narrower rule governing preemption of state law.[8] *Consol. Rail Corp.*, 536 F. Supp. 653, 657 (1982). However, this rule stressed that a state may adopt certain regulations relating to railroad safety *as long as these regulations are "not incompatible with any Federal law."* 45 U.S.C. § 434 (emphasis added). This preemption language also emphasized that the "standards relating to railroad safety shall be nationally uniform to the extent possible." *Id.* Thus, while the FRSA did open the door to permit certain, discrete state railroad regulations, it did not, as plaintiff claims, overrule *Napier* or negate the basic principles of preemption that apply here.

In an attempt to bolster their argument that the FRSA precludes preemption, plaintiff relies heavily upon *Norfolk & Western Ry. Co. v. Pa. Pub. Util. Comm'n*, 489 Pa. 109, 413 A.2d 1037, 1039 (Pa. 1980),

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8. The preemption section states:

> The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the same subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standards, and when not creating an undue burden on interstate commerce. 45 U.S.C § 434.

where the Pennsylvania Supreme Court ruled that the BIA did not preempt a state law regulating sanitary disposal devices on locomotives. Plaintiff's reliance on *Norfolk & Western* is misplaced for several reasons.

First, *Norfolk & Western* involved the state's Public Utility Commission's ability to regulate a railroad's practice of discharging human waste on railroad tracks. *Id.* at 1039-40. This type of regulation has no relation to the case at hand, where plaintiff worked on locomotive brake pads and valves, both of which are "parts" falling squarely within the language of the BIA. *See D'Amico*, 2007 U.S. Dist. Lexis 67664 at *17-18.

Second, although the *Norfolk & Western* Court notes that the FRSA did narrow Congressional intent to preempt the field of railroad safety, the legislative history of the FRSA reflects that Congress did not intend to abrogate entirely the preemption doctrine under the BIA. Indeed, instead of repealing, recodifying, or subsuming the BIA when it passed the FRSA, Congress specifically determined that the BIA was working well and should remain in force without any changes.[9] *Consolidated Rail Corporation*, 536 F.Supp. at 656 (legislative history of FRSA reflects that

9. "Over the years there have been several enactments of legislation dealing with certain phases of railroad safety. These include, among others ... (the) Locomotive Inspection Act .... These particular laws have served well. In fact the committee chose to continue them without change." H.R. Rep. No. 91-114, 91st Cong., 2d Sess. 11, reprinted in 1970 U.S. Code Cong. & Ad. News 4104, 4108.

Congress intended no change to the BIA). Consequently, despite the holding in *Norfolk & Western*, the FRSA does not affect the scope of preemption announced in *Napier*.

Lastly, plaintiff is mistaken in asserting that the 2007 amendments to FRSA apply to this case. *See* H.R. Rep. No. 110-336, at 28 (2007), reprinted at 2007 WL 2745328 at *28. Plaintiff relies on the language in the amendments stating that FRSA "does not preempt State law causes of action where a party has failed to comply with the Federal standard of care established by a regulation or order issued by the Secretary of Transportation." *See Id.* This isolated reference ignores, however, the fact that the amendments clearly were directed at the Minot, North Dakota, train derailment occurring on January 18, 2002.[10] In fact, the statute explicitly sets the effective date of the amendments as retroactive to January 18, 2002. *Id.* Because plaintiff's injuries were a result of "activities or events" occurring prior to January 18, 2002, the 2007 FRSA amendments are inapplicable to this case.[11]

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10. The amendments clarify that the FRSA (U.S.C. § 20106), as amended, applies to all pending state law causes of action arising from activities or events occurring on or after January 18, 2002, the date of the Minot, North Dakota, derailment.

11. In furtherance of the FRSA Amendment argument, plaintiff also relies on *DeFrancisco v. Owens-Illinois*, Docket No. CAM-L-1127-05 (N.J. Super. Ct., Camden Cty., June 2, 2008). There, the New Jersey Superior Court initially adopted the FRSA amendment argument plaintiff raises here. However, (Cont'd)

Appendix B

B. Coordinate Jurisdiction and Law of the Case

Plaintiff also argues that defendant Viad's Motion for Summary Judgment should be denied because Viad previously raised the preemption issue in a motion for summary judgment, which was denied, before removal to federal court, by the Honorable Alan L. Tereshko of the Philadelphia County Court of Common Pleas.[12] Judge Tereshko's ruling was delivered through a single sentence order, which simply denied the motion without any analysis or explanation regarding the basis of the ruling. (See, Pl.'s Answer to Viad's Mot. for Sum. J., Exhibit D). Plaintiff argues that, pursuant to the doctrine of coordinate jurisdiction, this Court must defer to Judge Tereshko's ruling because it is the prior holding of a coordinate court in the same case. *Id.* at 3.

(Cont'd)
that same court subsequently reversed its decision, admitting it had erred because it failed to take into account the 2002 effective date of the September 2007 amendment and the fact that the plaintiff's claims arose from exposure that ended in 1958. The court eventually held that the 2007 amendments to FRSA do not apply to injuries from exposure occurring before January 18, 2002.

12. While Defendant RFPC also filed a Motion for Summary Judgment before Judge Tereshko, that motion pertained to product identification and the issue of preemption was never raised. Thus, even if this Court were bound by Judge Tereshko's ruling, the "law of the case" would only apply to Viad and not RFPC.

Generally, plaintiff claims that the coordinate jurisdiction doctrine applies to coequal courts and stands for the proposition that "a court in the later phases of a litigated matter should not reopen questions decided by another judge of that same court . . . in the earlier phases of that matter." (Pl.'s Answer to Viad's Mot. for Sum. J., p. 3); *citing, Commonwealth v. Starr*, 541 Pa. 564, 664 A.2d 1326, 1331 (Pa. 1995). Therefore, plaintiff contends that because this Court's jurisdiction arises from the diversity of the parties, we are bound by the coordinate jurisdiction doctrine to follow Judge Tereshko's ruling. *Id. Citing, Erie v. Tompkins*, 304 U.S. 64, 78-80, 58 S. Ct. 817, 82 L. Ed. 1188 (1938). In short, the crux of plaintiff's coordinate jurisdiction argument is that this Court must act as a Pennsylvania court and refrain from disturbing the state court's ruling. *Id.* Plaintiff's argument is flawed for several reasons.

First, the denial of a motion for summary judgment is an interlocutory order. *Bines v. Kulaylat*, 215 F.3d 381, 384 (3d Cir. 2000). Thus, if a district court has proper jurisdiction over the case, "it possesses inherent power over interlocutory orders, and can reconsider them when it is consonant with justice to do so." *United States v. Jerry*, 487 F.2d 600, 605 (3d Cir. 1973). Indeed, a federal district court, at any time prior to a final decree, may modify, open or set aside an interlocutory order of the state court. *See General Invest. Co. v. Lake Shore & M.S.R. Co.*, 260 U.S. 261, 267, 43 S. Ct. 106, 67 L. Ed. 244, 1 Ohio Law Abs. 162 (1922); *Bon Air Hotel Inc., v. Time Inc.*, 426 F.2d 858, 862 (5th Cir. 1970); *Wolk v. Teledyne Indust. Inc.*, 475 F. Supp.2d 491, 507-8 (E.D.

Pa. 2007). In order for a federal district court to set aside the order of a state court and rule in the opposite, the court must have cogent and articulable reasons for doing so. *Preaseau v. Prudential Ins. Co. of America*, 591 F.2d 74, 79 (9th Cir. 1979). For reasons expressed *infra*, cogent and articulable reasons to rule differently than Judge Tereshko exist.

We note that Judge Tereshko, as a Pennsylvania trial court judge, is bound by Pennsylvania Supreme Court precedent. As such, his ruling presumably afforded great weight to *Norfolk & Western Ry. Co. v. Pennsylvania Pub. Util. Comm'n*, 489 Pa. 109, 413 A.2d 1037 (Pa. 1980), discussed above. This decision does not, however, constitute binding authority on this Court. In fact, two opinions from this Court decided after *Norfolk & Western* have applied preemption based on the BIA. *See D'Amico*, 2007 U.S. Dist. LEXIS 61664 at *20; *Consol. Rail Corp.*, 536 F. Supp. at 658. This Court's interpretation of the BIA, a federal law, and compelling federal court precedent necessitates the application of preemption. While Judge Tereshko's ruling was afforded great respect, the facts of this case nonetheless, fall squarely within the field preempted by the BIA.

Moreover, this Court is not bound by Judge Tereshko's ruling because a federal preemption analysis is governed by federal, not state law. *Grantham v. Avondale Industries, Inc.*, 964 F.2d 471, 473 (5th Cir. 1992). Plaintiff's assertion that the *Erie* doctrine mandates that we adopt Judge Tereshko's ruling is incorrect because the *Erie* doctrine "does not apply ...

in matters governed by the federal Constitution or by acts of Congress." *Id.* Indeed, federal courts "are not bound by a state court's interpretation of federal law regardless of whether our jurisdiction is based on diversity of citizenship or a federal question." *Id.* As the issue before this Court does not pertain to state law, but rather, hinges on a question of federal preemption, we are free to independently adjudicate defendants' motions.

Finally, Judge Tereshko's ruling provides no basis or explanation for denying Viad's motion, or even the slightest hint as to the facts or law that were relied upon. Nonetheless, plaintiff asks us to discern Judge Tereshko's reasoning through application of a separate and distinct case, *Atwell v. Chesterton*, Philadelphia Court of Common Pleas, May Term, 2004, No. 1366, where Judge Tereshko denied summary judgment with an accompanying "FINDINGS and ORDER." Plaintiff argues that "it is likely" that Judge Tereshko's reasoning in the case before this Court is the same as *Atwell*. (Pl.'s Memo. of Law, p. 2). Following this logic would require a federal court, in applying federal law, to be barred by a state court ruling in a completely separate and distinct lawsuit. Given the clear guidance expressed in *Napier* and subsequent opinions from Judges of this Court applying preemption in similar situations, we are unwilling to take this far a leap. *See Core v. Southwestern Bell Tel.*, 673 F. Supp. 974, 979 (W.D. Ark. 1987)(federal court unwilling to reconsider state court ruling where state court provided absolutely no basis for its decision to deny the motion). *Federal*

Deposit Ins. Corp. v. First Mortg. Inv., 485 F. Supp. 445, 450 (E.D. WI. 1980) (federal court reconsidered state court's denial of motion for summary judgment based on the preliminary and scantily reasoned determination . . . by the state trial court).

IV. CONCLUSION

For the foregoing reasons, I grant both Viad and RFPC's Motions for Summary Judgment. Plaintiff's common law tort claims are preempted by the BIA, a federal law enacted to occupy the field of regulating locomotives, their parts and appurtenances. Furthermore, this Court, exercising its authority to reexamine Judge Tereshko's denial of summary judgment in state court, respectfully declines to follow Judge Tereshko's ruling. An appropriate order follows.

BY THE COURT:

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MITCHELL S. GOLDBERG, J.

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DENYING RECONSIDERATION OF SUMMARY JUDGMENT ORDERS GRANTED IN THE PHILADELPHIA COUNTY COURT OF COMMON PLEAS, DATED SEPTEMBER 11, 2008

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, CIVIL SECTION – TRIAL DIVISION

CIVIL ACTION
NO.: 08-CV-2216

GLORIA GAIL KURNS, Executrix of The Estate of GEORGE M. CORSON, Deceased, and FREIDA E. JUNGE CORSON, Widow in her own right,

Plaintiffs,

vs.

A. W. CHESTERTON, INC., *et al.*,

Defendants.

ORDER

AND NOW, this 11th day of Sept, 2008, upon consideration of Plaintiffs' Motion for Reconsideration of Summary Judgment to Airco/BOC, and any

response(s) thereto, it is hereby **ORDERED** and **DECREED** that said Motion is hereby **DENIED** without prejudice as this Court is without jurisdiction over this matter.

BY THE COURT:

/s/
James T. Giles

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING EN BANC, FILED OCTOBER 5, 2010

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 09-1634

GLORIA GAIL KURNS,
Executrix of The Estate of George M. Corson,

Deceased,

FREIDA E JUNG CORSON,
Widow In Her Own Right

v.

A.W. CHESTERTON INC, Et Al.; BOC INC, Airco Welders Supply Inc.; RAILROAD FRICTION PRODUCTS CORPORATION; VIAD CORP

Gloria Gail Kurns; Freida E. Jung Corson,

Appellants.

SUR PETITION FOR REHEARING

Present: McKEE, *Chief Judge*, SLOVITER, SCIRICA RENDELL, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, GREENAWAY, JR. and VANASKIE, *Circuit Judges*

Appendix D

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

MICHAEL A. CHAGARES
Circuit Judge

DATED: October 5, 2010
PDB/cc: All Counsel of Record